Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

Ray Van Alstine, dba Palm Desert Mobile Estates,
Petitioner and Appellant,

v.

The City of Palm Desert and
the Palm Desert Rent Review Board,
Respondents and Appellees.

The Tenants Residing at Palm Desert Mobile Estates
Real Parties in Interest.

On Petition for Writ of Certiorari
to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

NUMBER ONE. UNDER THE CITY OF PALM DESERT'S RENT CONTROL REGULATIONS IT IS "PRESUMED" THAT ADJUSTING A LANDLORD'S 1982 NET OPERATING INCOME BY 50% OF THE INCREASE IN THE INFLATION RATE WILL RESULT IN A "FAIR RETURN" IN ALL FUTURE YEARS. IS SUCH AN EVIDENTIARY PRESUMPTION SO ARBITRARY THAT IF VIOLATES THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION?

NUMBER TWO: DOES THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION PROHIBIT AN ADMINISTRATIVE AGENCY (OR A REVIEWING COURT) FROM REJECTING UNCONTRADICTED AND UNIMPEACHED EXPERT TESTIMONY REGARDING RATES OF RETURN ON INVESTMENT IN A PRICE REGULATED INDUSTRY, OR FROM UNILATERALLY ESTABLISHING A RATE OF RETURN THAT IS NOT SUPPORTED BY ANY EXPERT TESTIMONY?

LIST OF PARTIES

The Petitioner is Plaintiff and Appellant Ray Van Alstine, dba Palm Desert Mobile Estates. The Petitioner is represented by Anthony C. Rodriguez of the Law Office of Anthony C. Rodriguez, 1425 Leimert Boulevard, Suite 101, Oakland, California 94602.

The Respondents are the City of Palm Desert and the Palm Desert Rent Review Board, represented by Douglas S. Phillips of Best, Best & Krieger, 74-760 Highway 111, Suite 200, Indian Wells, California 92210.

The Real Parties in Interest are the Tenants residing at Palm Desert Mobile Estates, represented by Charles A. Prawdzik of the Law Office of Charles A. Prawdzik, 1612 Preston Park Drive, Henderson, Nevada 89052.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

LEGAL ARGUMENTS 10

QUESTION NO. ONE: UNDER THE CITY OF PALM DESERT'S RENT CONTROL REGULATIONS IT IS "PRESUMED" THAT ADJUSTING A LANDLORD'S 1982 NET OPERATING INCOME BY 50% OF THE INCREASE IN THE INFLATION RATE WILL RESULT IN A "FAIR RETURN" IN ALL FUTURE YEARS. IS SUCH AN EVIDENTIARY PRESUMPTION SO ARBITRARY THAT IF VIOLATES THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION? 10

A. THE PRESUMPTION THAT ADJUSTING BASE YEAR PROFITS FOR 50% OF THE INCREASE IN THE INFLATION RATE IS ARBITRARY AND THEREFORE VIOLATES DUE PROCESS 10

B. THE PRESUMPTION IS ARBITRARY

BECAUSE ANYTHING LESS THAN A FULL INFLATIONARY ADJUSTMENT OF BASE YEAR PROFITS WILL ULTIMATELY RESULT IN A CONFISCATORY TAKING OF PROPERTY 13

C. THE VARYING PERCENTAGES USED TO "PRESUME" A FAIR RETURN IN OTHER CALIFORNIA CITIES SUPPORT THE PROPOSITION THAT THE "PRESUMPTION" IN THE CITY OF PALM DESERT'S ORDINANCE IS ARBITRARY 16

QUESTION NO. TWO: DOES THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION PROHIBIT AN ADMINISTRATIVE AGENCY (OR A REVIEWING COURT) FROM REJECTING UNCONTRADICTED AND UNIMPEACHED EXPERT TESTIMONY REGARDING RATES OF RETURN ON INVESTMENT IN A PRICE REGULATED INDUSTRY, OR FROM UNILATERALLY ESTABLISHING A RATE OF RETURN THAT IS NOT SUPPORTED BY ANY EXPERT TESTIMONY? 18

A. PALM DESERT MOBILE ESTATES IS ENTITLED TO A JUST AND REASONABLE RETURN BASED ON THE EVIDENCE SUBMITTED AT THE ADMINISTRATIVE HEARING 19

B. IN ADMINISTRATIVE MANDAMUS PROCEEDINGS A COURT MUST DETERMINE WHETHER THE "FINDINGS" THAT WERE ACTUALLY MADE ARE SUPPORTED BY "SUBSTANTIAL EVIDENCE" 24

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Abrahamson v. City of Carpenteria, 10 Cal. App. 4th 542 (1992) 17

Bonzer v. Huntington Park, 20 Cal. App. 4th 1479 (1993) 24

City of Berkeley v. Berkeley Rent Stabilization Board, 27 Cal. App. 4th 951 (1994) 12, 15

Cotati Alliance for Better Housing v. City of Cotati, 148 Cal. App.3d. 280 (1983) 20

Craig v. Brown & Root, Inc., 84 Cal. App. 4th 416 (2000) 24

Donahoe v. Santa Paula West Mobilehome Park, 47 Cal. App. 4th 1168 (1996) 17

Duquesne Light Co. v. Barasch, 488 U. S. 299 (1989) 19

Federal Power Commission v. Natural Gas Pipeline, Co., 315 U.S. 575 (1942) 20

Federal Power Comm'n v. Hope Gas Co., 320 U. S. 591 (1944) .. 20

Fisher v. City of Berkeley, (1984) 37 Cal. 3d 644 (1984) 13, 15

Kavanau v. Santa Monica Rent Control Board, 19 Cal. 4th 761 (1997) 17

Loretto v. Teleprompter Manhattan CATV Corp., 458 U. S. 419 (1982) 19

Martori Brothers Distributors v. Agricultural Labor Relations Board, 29 Cal. 3d 721 (1981) 21

Marvin v. Adams, 224 Cal. App. 3d 956 (1990) 11

McAllister v. Workmen's Comp. App. Bd., 69 Cal. 2d 408 (1968) 21, 23

Nebbia v. New York, 291 U.S. 502 (1934) 11, 16, 18

Northern Pac. Ry. Co. v. Department of Public Works of Washington, 268 U.S. 39 (1925) 20

Oceanside Mobilehome Parkowners Association v. City of Oceanside, 157 Cal. App. 3d 887 (1984) 17

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393 (1922) 19

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 14

Sandpiper Mobile Village, v City of Carpenteria, 10 Cal. App. 4th 542 (1992) 17

Securities and Exchange Commission v. Chenery Corp, 318 U.S. 80 (1943) 24

Slater v. Kehoe, 38 Cal. App. 3d 819 (1974) 24

Topanga Assn. for a Scenic Community v. County of Los Angeles, (1974) 11 Cal. 3d 506 (1974) 24

Tot v. United States, 319 U. S. 463 (1943) 11, 16, 18

Webb's Fabulous Pharmacies v. Beckwith, 449 U. S. 155 (1980) . 19

Whispering Pines Mobilehome Park v. City of Scotts Valley, 180 Cal. App.3d 152 (1986) 21

Codes and Statutes

28 U.S.C. § 1254(1) 2

California Evidence Code Section 640 12

California Evidence Code Section 641 12

U. S. Const. Amend. V 19

PETITION FOR A WRIT OF CERTIORARI TO REVIEW AN ORDER OF THE CALIFORNIA SUPREME COURT DENYING DISCRETIONARY REVIEW OF THE JUDGMENT OF THE FOURTH DISTRICT COURT OF APPEAL

Petitioner Ray Van Alstine, dba Palm Desert Mobile Estates prays for a writ of certiorari to review an order of the California Supreme Court declining to review the judgment of the Fourth District Court of Appeal of the State of California.

OPINIONS BELOW

The June 18, 2003 order of the California Supreme Court declining discretionary review is included in the Appendix to this petition, at page A-1. The March 14, 2003 decision of the Fourth District Court of Appeal denying the Petitioner a rent increase is included in the Appendix to this petition, at pages A-2 through A-26. The March 13, 2002 judgment of the Riverside County Superior Court denying the Petitioner a rent increase is included in the Appendix to this petition at pages A-28 through A-32. The January 28, 2000 decision of the Palm Desert Rent Review Board denying the Petitioner a rent increase is included in the Appendix to this petition at pages A-33 through A-74.

JURISDICTION

The California Supreme Court denied the petition for review on June 18, 2003. This Petition for a Writ of Certiorari is filed within 90 days of that date. The jurisdiction of this court to review the denial of the California Supreme Court's Petition for Review is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the due process clauses of the fifth and fourteenth amendments to the United States Constitution. The fifth amendment provides in relevant part as follows:

> "No person shall . . . be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation."

The fourteenth amendment provides in relevant part as follows:

> "...Nor shall any State deprive any person of . . . property, without due process of law."

This case also involves Regulations 101(A) and 101(B) to the City of Palm Desert's mobilehome rent control ordinance. Those regulations are set forth at pages A-75 through A-77 of the Appendix filed herewith.

STATEMENT OF THE CASE

Palm Desert Mobile Estates is a 144 space mobilehome park located in Palm Desert, California. (AR 70).[1] It is owned by Mr. and Mrs. Ray Van Alstine. The Van Alstines purchased the park on July 24, 1978 for $1,550,000. (AR 72). At that time, there was no rent control in the City of Palm Desert. (AR 154-180).

In 1982, the City of Palm Desert enacted rent control for all mobilehome parks within the City limits, including Palm Desert Mobile Estates. (AR 154-180). Mr. Van Alstine's tax returns demonstrate that the park operated at a "loss" each and every year between 1978 and 1982, including a $69,314 "loss" in 1982. (AR 187, line 26; AR 188, line 26; AR 189, line 34; AR 190, line 33 and AR 191, line 32). During those same years, lower risk treasury bonds were generating returns ranging from 8.18% to 14.68%. (AR 868-869).

In 1996 the Van Alstines invested an additional $702,060 in the park, including the installation of a new sewer system and the

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[1] All references to "AR" are to the Administrative Record from the underlying administrative proceedings before the City of Palm Desert. All references to "CT" are to the Clerk's Transcript on Appeal and all references to "RT" are to the Reporter's Transcript on Appeal.

construction of new roads. (AR 248, 249-266). Because the park did not generate sufficient income to enable them to pay cash for those projects, they borrowed that money. Under the terms of the loan, Mr. Van Alstine had to pledge the park as security. (AR 793).

Between 1978 and 1997 the Van Alstines were also exposed to increases in the consumer price index in excess of 140%. (AR 268-269 and 839). Although they were able to increase rents to account for some of those inflationary pressures, they were not able to achieve a fair return on their investment. (AR 815-864).

Sections 101(A) and (B) of the City of Palm Desert's regulations "presume" that adjusting a parkowner's 1982 or "base year" net operating income for 50% of the increase in the inflation rate will provide a fair return in all future years. (A-75). In this case, the evidence demonstrated that the Van Alstine's 1982 or "base year" net operating income was $177,752. (AR 191). The evidence also demonstrated that between December of 1982 and December of 1996 the consumer price index had increased by 63.9%, from 96.6 to 158.3. (AR 268). Therefore, the maximum net operating income the Van Alstines were entitled to under the "presumption" in the City's regulations was $234,508. ($177,725 x 1.3195 = $234,508).

Under Section 101(B) of the regulations, parkowners are also entitled to rebut the above "presumption," by demonstrating that it does not result in a "fair return." (A-75). However, Section 101(B) also states that "what constitutes a fair return on property is debatable," and therefore allows a parkowner to submit "any and all evidence or arguments" to rebut the presumption. (A-76).

On July 29, 1997, the Van Alstines applied for a $52.93 rent increase, so as to receive a fair return on their investment in the park. (AR 43-70).[2] The hearing on their application was delayed for almost two years, due to a dispute regarding the selection of the City's hearing officer. (AR 546-548, 347-545). As a result, on January 26, 1999, the Van Alstines amended their application, so as to account for the additional inflation that had occurred since 1997. (AR 1023-1027).

Hearings were held regarding the Van Alstines' amended application in April of 1999. (AR 1476 and 1839). At the hearings the Van Alstines offered the report and testimony of Dr. Richard

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[2] Because the City's regulations recognized that a return on "current fair market value" could be awarded, the Van Alstine's also noted that a $74.14 rent increase was available under that theory. (AR 60, lines 1-24; AR 50, lines 8-10; AR 59, lines 13-26; AR 69, lines 14-16).

Fabrikant, regarding rates of return on investment in mobilehome parks. (AR 815-864, at 846). Dr. Fabrikant received his MBA from The Wharton Graduate School of Finance and his Ph.D. in Economics from the University of California. Dr. Fabrikant also had substantial experience regarding rates of return in mobilehome parks, having provided expert testimony with respect to that subject on numerous occasions. (AR 1569, line 4-1572, line 5). Dr. Fabrikant began his testimony by demonstrating that the purpose of a return is to compensate an investor for the risk taken. (AR 1574, line 14-1576, line 15). As the risk inherent in an investment increases, so must the potential rate of return. (AR 826-833).

Dr. Fabrikant offered uncontradicted evidence regarding the rates of returns on various comparable investments, including mutual funds and real estate investment trusts ("REITS") that invested exclusively in mobilehome parks. (AR 1576, line 16-1588, line 16). After examining the rates of return available on such comparable investments, Dr. Fabrikant opined that a real rate of return of 10.4% was required to provide the Van Alstines with a fair return on their investment in the park. (AR 846). In order to obtain a real return of 10.4%, Dr. Fabrikant concluded that the Van Alstines required a net

operating income of at least $471,852. (AR 846).

In 1998, however, the Van Alstines' net operating income was only $371,583, or $100,269 less than the $471,852 amount necessary to provide a fair return. (AR 1026-1027). In order to receive a fair return, Dr. Fabrikant concluded that the Van Alstines required a rent increase of at least $58.03 per space per month. ($100,269 ÷ 144 spaces ÷ 12 months = $58.03 per month). (AR 846).

The tenants did not offer any expert testimony to contradict Dr. Fabrikant's expert opinion regarding the rent increases necessary to provide a fair return. In fact, the tenants' only witness was their own attorney, Charles Prawdzik. (AR 1886, lines 18-21). In addition to the fact that Mr. Prawdzik was not an expert regarding rates of return, he had no opinion as to the rate of return necessary to provide a fair return in this case. (AR 1942, line 5 through AR 1943, line 18). To the contrary, on at least three occasions Mr. Prawdzik indicated that he "agree[d] with [Dr. Fabrikant's] financial theory." (AR 1664, line 3-4; AR 1660, lines 17-19; AR 1648, lines 7-24).

At the conclusion of the administrative hearing, the hearing officer found that the Van Alstines had not rebutted the "presumption" in the City's ordinance, writing "*that the MNOI method*

provides the parkowners with a fair return." (A-72 and A-73). However, the hearing officer did not find that Dr. Fabrikant was biased. (A-35 through A-74). In addition, the hearing officer did not find that any of Dr. Fabrikant's theories had been disproved. (A-35 through A-74). To the contrary, the hearing officer indicated that other than failing to "rebut the presumption" in the City's ordinance, Dr. Fabrikant's theories were acceptable. (A-72).

On November 22, 1999, the Van Alstines appealed the hearing officer's decision to the full Rent Review Board, challenging the "presumption" in the City's ordinance and arguing that the hearing officer had deprived them of a fair return. (AR 1168-1199). However, the Board simply reaffirmed the hearing officer's decision, also finding that the Van Alstines had failed to submit sufficient evidence to rebut the "presumption" in the City's ordinance (A-33and A-34). Again, however, the Board did not analyze the theories offered by Dr. Fabrikant and made no finding that Dr. Fabrikant's opinion was biased, or otherwise improper. (A-33and A-34).

On April 5, 2000, Mr. Van Alstine appealed to the Riverside County Superior Court, raising the same issues that had been raised before the Rent Review Board. (CT Vol. 1, pgs. 1-16). On January 31,

2002, the trial court issued its ruling, also finding that the Van Alstines had failed to rebut the "presumption" in the City's ordinance. (A-27 through A-32). Again, however, the trial court did not analyze the theories offered by Dr. Fabrikant and made no finding that his opinion was biased, or otherwise improper. (A-27 through A-32). Accordingly, on May 13, 2002, Mr. Van Alstine filed an appeal with the Fourth District Court of Appeal, again rasing the same issues that had been raised before the Rent Review Board and the Superior Court. (CT Vol. 2, pgs. 358-362).

On March 14, 2003, the Court of Appeal found that Mr. Van Alstine had in fact submitted sufficient evidence to rebut the "presumption" in the City's ordinance. (A-15 through A-19). However, the Court of Appeal then found that the hearing officer *could have* rejected Dr. Fabrikant's uncontradicted expert opinion for a number of reasons, including bias and/or his failure to establish one or more material facts. (A-23). Although the hearing officer himself made ***no*** such findings regarding Dr. Fabrikant, the Court of Appeal then rejected Dr. Fabrikant's opinion and found that the 8.9% return the Van Alstines were receiving before they filed their application was a fair return. (A-23 through A-26).

On April 22, 2003, Mr. Van Alstine filed a timely petition for review with the California Supreme Court, again raising the same issues that had been before the Board and the lower courts, but also challenging the Court of Appeal's new findings that 8.9% was a fair rate of return. On June 18, 2003, the California Supreme Court denied Mr. Van Alstine's petition for review, without comment. (A-1). Because the end result of this litigation is that the California courts have concluded that uncontradicted and unimpeached expert testimony is not sufficient to establish a property owner's right to a fair return, Mr. Van Alstine has filed this petition for a writ of certiorari.

LEGAL ARGUMENTS

QUESTION NO. ONE: UNDER THE CITY OF PALM DESERT'S RENT CONTROL REGULATIONS IT IS "PRESUMED" THAT ADJUSTING A LANDLORD'S 1982 NET OPERATING INCOME BY 50% OF THE INCREASE IN THE INFLATION RATE WILL RESULT IN A "FAIR RETURN" IN ALL FUTURE YEARS. IS SUCH AN EVIDENTIARY PRESUMPTION SO ARBITRARY THAT IF VIOLATES THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION?

A. THE PRESUMPTION THAT ADJUSTING BASE YEAR PROFITS FOR 50% OF THE INCREASE IN THE INFLATION RATE IS ARBITRARY AND THEREFORE VIOLATES DUE PROCESS

A "presumption" is a tool to enable fact finders to make certain conclusions in the absence of contrary evidence. Marvin v. Adams, 224 Cal. App. 3d 956, 961 (1990). However, in order to comport with due process, a "presumption" may not be based on "arbitrary" assumptions. As stated by the United States Supreme Court in Tot v. United States, 319 U. S. 463, 467-468 (1943):

> "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience . . . [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.

In addition to the general law regarding "presumptions," the United States Supreme Court has specifically held that any system of price controls is unconstitutional if it is "arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." Nebbia v. New York, 291 U.S. 502, 539 (1934).

Thus, at least one California Appellate Court has suggested in dicta that a rent control ordinance that limits increases in "base year' net operating income to 40% of the increase in the inflation rate is "arbitrary" and therefore, presumably unconstitutional. City of Berkeley v. Berkeley Rent Stabilization Board, 27 Cal. App. 4th 951, 969-970 (1994).

In this case, Sections 101(A) and (B) of the City of Palm Desert's regulations "presume" that adjusting a parkowner's 1982 net operating income for *50%* of the increase in the inflation rate will result in a fair return in all future years. (A-75). However, that *50%* figure is wholly arbitrary, as there are no findings or evidentiary support for it anywhere in the City's regulatory scheme. Because the "presumption" in the City's regulations is totally arbitrary, that presumption must be declared unconstitutional.[3]

B. THE PRESUMPTION IS ARBITRARY BECAUSE ANYTHING LESS THAN A FULL INFLATIONARY ADJUSTMENT

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3 For an example of a presumption that does not appear to violate the due process clause, see California Evidence Code Section 641 ["a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail"]. See also California Evidence Code Section 640: ["a writing is presumed to have been truly dated."]

OF BASE YEAR PROFITS WILL ULTIMATELY RESULT IN A CONFISCATORY TAKING OF PROPERTY

In Fisher v. City of Berkeley, 37 Cal. 3d 644, 683 (1984), the California Supreme Court recognized that any attempt to "freeze" a property owner's "base year" net operating income in the face of inflation will eventually result in a confiscatory taking of property. The Fisher court addressed this issue as follows:

> "Clearly, if the fixed amount of a landlord's profit remains the same year after year his return will in time diminish in real value: it is obvious that a $1,000 "profit" in 1990 will have a much lower value than the same dollar amount of profit in 1980. . . . Therefore, although Defendants' ordinance may properly restrict landlords' profits on their rental investment, it may not indefinitely freeze the dollar amount of those profits without eventually causing confiscatory results. (Id at 683).

Under Fisher, supra, it is clear that any attempt to indefinitely freeze "base year" net operating income will necessarily result in a confiscatory taking, because the "real" purchasing power of the parkowner's profit will be eroded over time. In other words, if the City simply allows the dollar amount of the parkowner's "base year"

profits to remain constant over time, the long term impact of inflation will cause the real value of those profits to decrease, eventually resulting in a return that is below the minimum level required by the constitution.

For example, assume that in 1980 a parkowner had gross income of $200,000, expenses of $120,000 and a profit of $80,000. Assume further that in 1980, $70,000 was the minimum profit necessary to provide a fair return for that particular investment. Because that parkowner's $80,000 return would have been within "the broad zone of reasonableness," such a parkowner would have no claim for the confiscatory taking of his property at that time. Permian Basin Area Rate Cases, 390 U.S. 747, 770 (1968).

If during the next 20 years the inflation rate increases by 100%, the minimum amount necessary to "maintain" that fair return will also have increased by 100%, from $70,000 to $140,000. Under the "presumption" in the City of Palm Desert's ordinance, however, such a parkowner would have been entitled to increase "base year" profits by only 50% of the increase in the inflation rate, from $80,000 to $120,000. Therefore, even though the "presumption" in the City's ordinance would have allowed a $40,000 increase in profits, the

parkowner would not only be worse off than he was in 1980, he would no longer be making a fair return.

Based on the California Supreme Court's findings in Fisher, supra, it is obvious that any attempt to "freeze" base year profits for the impact of inflation will ultimately result in the confiscatory taking of property. However, it is equally obvious that adjusting "base year" profits by any amount less than 100% of the increase in the inflation rate will ultimately achieve that same result, only over a longer period of time. In other words, whereas an ordinance that allows "base year" profits to be adjusted for 75% of the increase in the inflation rate may not result in a confiscatory taking of property for 10 or 15 years, an ordinance that allows "base year" profits to be adjusted for only 25% of the inflation rate may achieve a confiscatory taking of property in only five years. See also City of Berkeley v. Berkeley Rent Stabilization Board, 27 Cal. App. 4th 951, 968 (1994) [" . . . rent control cannot be allowed to result in a slow unconstitutional taking through the combined effects of inflation and regulatory delay . . . "].

In short, based on the reasoning in the California Supreme Court's decision in Fisher v. City of Berkeley, 37 Cal. 3d 644, 683 (1984), it is a mathematical certainty that adjusting "base year" profits

for less than 100% of the increase in the inflation rate will ultimately result in a diminution in the real value of the parkowner's profits and a confiscatory taking of property. Because it is a mathematical certainty that adjusting "base year" profits for less than 100% of the increase in the inflation rate will result in the confiscatory taking of property over time, it is completely irrational to allow local governments to "presume" such adjustments also result in a fair return. Because the "presumption" that adjusting "base year" profits for less than the full increase in the inflation rate does not "have a rationale relation to the circumstances of life as we know them," but instead can be disproved with mathematical certainty, the "presumption" in the City's ordinance is unconstitutional and must be struck down by this court. Tot v. Untied States, 319 U.S. 463, 467-468 (1943). See also Nebbia v. New York, 291 U.S. 502, 531 (1934) [price controls are unconstitutional if "arbitrary."].

C. THE VARYING PERCENTAGES USED TO "PRESUME" A FAIR RETURN IN OTHER CALIFORNIA CITIES SUPPORT THE PROPOSITION THAT THE "PRESUMPTION" IN THE CITY OF PALM DESERT'S ORDINANCE IS ARBITRARY

A review of California case law demonstrates that a number of

other rent control ordinances in the state contain provisions whereby "base year" profits may be adjusted for less than 100% of the increase in the inflation rate.[4] Those cases indicate percentage adjustments ranging from 40% of the increase in the inflation rate to 75% of the increase in the inflation rate. Those cities and the percentages mentioned in those cases are compared to the Palm Desert ordinance as follows:

City	Adjustment
1. Santa Monica	40%
2. Santa Paula	75%
3. Carpenteria	75%
4. West Hollywood	60%
5. Oceanside	40%
6. Palm Desert	50%

As the above table demonstrates, it is "presumed" that every landlord in Santa Monica and every landlord in Oceanside will receive

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[4] See Kavanau v. Santa Monica Rent Control Board, 19 Cal. 4th 761 (1997); Donahoe v. Santa Paula West Mobilehome Park, 47 Cal. App. 4th 1168 (1996); Sandpiper Mobile Village, v City of Carpenteria, 10 Cal. App. 4th 542 (1992): Abrahamson v. City of Carpenteria, 10 Cal. App. 4th 542 (1992); Oceanside Mobilehome Parkowners Association v. City of Oceanside, 157 Cal. App. 3d 887 (1984).

a fair return if their "base year" profits are adjusted by 40% of the increase in the inflation rate. By contrast, it is presumed that every property owner in Carpenteria and every property owner in Santa Paula will receive a fair return if their "base year" profits are adjusted for 75% of the increase in the inflation rate.

There is no way to rational way to explain the widely varying percentages in the ordinances in the above listed cities. To the contrary, the only conclusion that can be derived from the above listed percentages is that the ***real*** value of a landlord's "base year" profits will erode at a faster rate in Santa Monica and Oceanside than in Santa Paula and Carpenteria. Because there is no rational basis for adjusting "base year" profits by such varying amounts, the "presumptions" in each of the above ordinances, including the Palm Desert ordinance, are unconstitutional. Tot v. United States, 319 U.S. 463, 467-468 (1943); Nebbia v. New York, 291 U.S. 502, 539 (1934).

QUESTION NO. TWO: DOES THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION PROHIBIT AN ADMINISTRATIVE AGENCY (OR A REVIEWING COURT) FROM REJECTING UNCONTRADICTED AND UNIMPEACHED EXPERT TESTIMONY REGARDING RATES OF RETURN ON INVESTMENT IN A PRICE REGULATED INDUSTRY, OR FROM UNILATERALLY ESTABLISHING A RATE OF RETURN THAT IS NOT SUPPORTED BY ANY EXPERT TESTIMONY?

A. PALM DESERT MOBILE ESTATES IS ENTITLED TO A JUST AND REASONABLE RETURN BASED ON THE EVIDENCE SUBMITTED AT THE ADMINISTRATIVE HEARING

The takings clause of the fifth amendment to the United States constitution prohibits the taking of private property for a public purpose, without the payment of just compensation. U. S. Const. Amend. V. The takings clause applies to the states through the due process clause of the fourteenth amendment. Webb's Fabulous Pharmacies v. Beckwith, 449 U. S. 155, 160 (1980). Originally, the takings clause applied only to the actual physical occupation of land by a governmental agency. Loretto v. Teleprompter Manhattan CATV Corp., 458 U. S. 419, 427, N.5 (1982). However, it has now been expanded to prohibit the taking of all types of property interests, including takings caused by the enforcement of governmental regulations that "go too far." Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 415 (1922).

The takings clause and the due process clause place constitutional constraints on the ability of local governments to regulate prices, requiring that regulated prices result in a rate of return that is "just and reasonable." Duquesne Light Co. v. Barasch,

488 U. S. 299, 307-308 (1989). Thus, a local government is constitutionally prohibited from setting prices at a confiscatory rate. Federal Power Commission v. Natural Gas Pipeline, Co., 315 U.S. 575, 585-586 (1942). A confiscatory rate is one that prevents property owners from receiving a return that is "commensurate with returns on investments in other enterprises having corresponding risks." Federal Power Comm'n v. Hope Gas Co., 320 U. S. 591, 603 (1944). Of course, because rental property is a relatively risky investment, it commands a greater return than lower risk investments, such as federally insured certificates of deposit. Cotati Alliance for Better Housing v. City of Cotati, 148 Cal. App.3d. 280, 295 (1983).

Determining the rates that will provide the owners of regulated properties with a fair return "is the product of expert judgment." Federal Power Comm'n v. Hope Gas Co., 320 U.S. 591, 602 (1944). However, that "expert judgment" cannot be sustained if not supported by substantial evidence in the administrative record. As stated by the United States Supreme Court in Northern Pac. Ry. Co. v. Department of Public Works of Washington, 268 U.S. 39, 44, 45 (1925):

"But where rates found by a

> regulatory body to be compensatory are attacked as being confiscatory, courts may inquire into the method by which its conclusion was reached. An order based upon a finding made without evidence . . . or upon a finding made upon evidence which clearly does not support it . . . is an arbitrary act against which courts afford relief. The error under the discussion was of this character. It was a denial of due process."

Based on the above authority, it is clear that the appropriate rate of return on an investment such as Palm Desert Mobile Estates must be determined by expert testimony. Whispering Pines Mobilehome Park v. City of Scotts Valley, 180 Cal. App.3d 152, 160 (1986). In addition, "[a]n administrative board must accept as true the intended meaning of uncontradicted and unimpeached evidence" regarding the rate of return. Martori Brothers Distributors v. Agricultural Labor Relations Board, 29 Cal. 3d 721, 728 (1981). In other words, unless there is substantial evidence to support a "finding" rejecting unimpeached and uncontradicted testimony, it must be accepted by the administrative tribunal. As stated by the California Supreme Court in McAllister v. Workmen's Comp. App. Bd., 69 Cal. 2d 408, 413 (1968):

> "In this case, however, even the indulgence of the substantial evidence rule will not permit us to uphold the board's decision. We note at the outset that no effort was ever made – either by way of allegation or evidence – to question the honesty or competence of any of the petitioner's witnesses. Accordingly, we as the board, in view of the City's failure to introduce any contradictory evidence, must assume the accuracy of the testimony. Likewise, the meaning of the testimony, and the inferences to be drawn from it, cannot be disputed.

In this case, Dr. Fabrikant provided uncontradicted expert testimony that the minimum rate of return required to provide a return commensurate with other enterprises having corresponding risks was 10.4% (AR 846). In its decision, the Court of Appeal set forth several reasons the hearing officer "could have" given for rejecting Dr. Fabrikant's uncontradicted expert testimony, including lack of credibility or the failure to establish a material fact. (A-23). However, the hearing officer never made such findings, let alone cited "substantial evidence" to support such findings. (A-35 through A-74). To the contrary, the hearing officer found that other than the failure to rebut the "presumption" in the ordinance, there was nothing wrong with Dr. Fabrikant's theories, writing as follows:

> "This is not to say that the inflation adjusted method . . . is incorrect, or is not a way to measure a parkowner's entitlement to a rent increase." (A-72).

Again, although the hearing officer "could have" made findings regarding the "honesty or competence" of Dr. Fabrikant's testimony, the hearing officer did not do so. Because the hearing officer did not make such findings, "the meaning of [Dr. Fabrikant's] testimony, and the inferences to be drawn from it, cannot be disputed." McAllister v. Workmen's Comp. App. Bd., 69 Cal. 2d 408, 413 (1968).

Because there was no evidence anywhere in the record that an 8.19% rate of return is "commensurate with returns on investments in other enterprises having corresponding risks," the Court of Appeal's finding to that effect was not supported by any evidence at all, let alone substantial evidence. Because a decision not supported by any evidence violates due process, Mr. Van Alstine's petition must be granted and the case remanded to the administrative agency, with instructions to make "findings" consistent with the evidence.[5] See

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[5] Once a party offers evidence to rebut the presumption, "the presumption disappears" and the decision must be based

Securities and Exchange Commission v. Chenery Corp, 318 U.S. 80, 94 (1943) [administrative "action must be measured by what [the Board] did, not what it might have done."].

B. IN ADMINISTRATIVE MANDAMUS PROCEEDINGS A COURT MUST DETERMINE WHETHER THE "FINDINGS" THAT WERE ACTUALLY MADE ARE SUPPORTED BY "SUBSTANTIAL EVIDENCE"

In Securities and Exchange Commission v. Chenery Corp, 318 U.S. 80, 94 (1943), the United States Supreme Court found that proper judicial review of the decisions of administrative agencies "requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." The Chenery Corp. Court also found that an administrative "action must be measured by what [the Board] did, not by what it might have done." Id at 94. In Topanga Assn. for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 515, 516 (1974), the California Supreme Court expounded upon these principles as follows:

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solely on the evidence. Slater v. Kehoe, 38 Cal. App. 3d 819 (1974), 832, N. 12; Bonzer v. Huntington Park, 20 Cal. App. 4th 1479, 1481 (1993); Craig v. Brown & Root, Inc., 84 Cal. App. 4th 416, 421 (2000).

> "[I]mplicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. . . . Reference, in section 1094.5, to the reviewing court's duty to compare the evidence and ultimate decision to "the findings" we believe leaves no room for the conclusion that the Legislature would have been content to have a reviewing court speculate as to the administrative agency's basis for decision.
>
> Our ruling in this regard finds support in persuasive policy considerations . . . As stated by the United States Supreme Court, the "accepted ideal . . . is that 'the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.' (S.E.C. v. Chenery Corp. (1943) 318 U.S. 80, 94.)". . . .

In this case, the expert report submitted by Dr. Fabrikant provided three alternative methods to demonstrate that Mr. Van Alstine was not receiving a fair return on his investment. (AR 844-858). In his decision, the hearing officer did not discredit those three alternative methods. (A-72). In addition, the hearing officer did not find Dr. Fabrikant was biased, or otherwise unqualified to render an

opinion. (A-35 through A-74). Rather, the hearing officer found that Mr. Van Alstine had not submitted sufficient evidence to overcome the "presumption" in the City's ordinance. (A-73). Because the hearing officer found that Mr. Van Alstine had not submitted sufficient evidence to rebut the presumption, the hearing officer found that Mr. Van Alstine was making a fair return *under the "presumption."* (A-73 and A-74).

If the hearing officer had "found" that Dr. Fabrikant was biased or otherwise unqualified, the hearing officer would have been required to provide reasons for such findings. If the hearing officer had provided such reasons, Mr. Van Alstine would have been entitled to demonstrate that such findings were not supported by substantial evidence. Again, however, the hearing officer did not make any such findings regarding Dr. Fabrikant. (A-35 through A-74).

Similarly, if the hearing officer had found that the three theories offered by Dr. Fabrikant were flawed, the hearing officer would have been required to provide reasons for those findings. Again, however, the hearing officer did not discredit any of the three theories offered by Dr. Fabrikant, let alone make "findings" that could be challenged under the substantial evidence test.

To the contrary, the hearing officer, the Rent Review Board and the Riverside County Superior Court all "found" that Mr. Van Alstine had not submitted sufficient evidence to rebut the "presumption" in the City's ordinance and therefore failed to consider any of the theories submitted by Dr. Fabrikant. Although the Court of Appeal ruled that Mr. Van Alstine did in fact submit sufficient evidence to rebut the presumption, the Court of Appeal did not remand the proceedings to the administrative agency to make findings based on the evidence that was submitted.

Instead, the Court of Appeal found that the Board "could have" found that Dr. Fabrikant's testimony was "biased" or otherwise improper. (A-23). The Court of Appeal then made its own findings, unilaterally rejected Dr. Fabrikant's testimony and concluded that the 8.19% return the Van Alstines were receiving when they filed their application was fair. (A-23 through A-26). Because the Court of Appeal acted contrary to law, Mr. Van Alstine respectfully requests this court to grant this petition, so that the matter may ultimately by remanded to the administrative agency with instructions to make "findings" regarding the evidence that was submitted, which "findings" can then be tested under the "substantial evidence" rule.

CONCLUSION

The "presumption" in the City of Palm Desert's ordinance violates due process, because it arbitrarily assumes that adjusting a property owner's 1982 net operating income for 50% of the increase in the inflation rate will result in a fair return in all future years. The decision to deny Mr. and Mrs. Van Alstine a rent increase also violates due process, because it is based on the rejection of uncontradicted and unimpeached expert testimony and because it results in the setting of a rate of return that is not supported by any expert testimony regarding rates of return.

Respectfully submitted,

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